BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT L. KING III	)	
Claimant	)	
	)	
VS.	)	
	)	
SAM'S CLUB	)	
Respondent	)	Docket No. 1,065,261
	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 14, 2013, preliminary hearing Order entered by Administrative Law Judge William G. Belden. David B. Mandelbaum of Leawood, Kansas, appeared for claimant. Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found "the alleged accident of April 18, 2013, was identifiable by time and place of occurrence during a single work shift, produced symptoms of an injury, and was the prevailing factor causing the medical condition and need for further medical treatment."[1] Further, the ALJ concluded claimant sustained injuries to his low back from an accident that arose out of and in the course of his employment with respondent. Dr. Mark Bernhardt was designated as the authorized treating physician.[2]

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[1] ALJ Order (June 14, 2013) at 4.

[2] An Agreed Order submitted and approved after the preliminary hearing of June 12, 2013, appointed Dr. Lan Fotopolous as authorized treating physician, due to scheduling delays with Dr. Bernhardt.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 12, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

The respondent argues claimant's injury did not arise out of his employment with respondent as he was engaged in prohibited work at the time of his accident. Additionally, respondent maintains claimant has not sustained his burden of proving that the accident was the prevailing factor in causing an injury.

Claimant contends the ALJ's Order should be affirmed. Claimant argues the prohibited work doctrine is inapplicable under the evidence and maintains his testimony is the more credible, as demonstrated by both the evidence and the ALJ's finding. Further, claimant states the medical evidence and claimant's testimony have clearly established that the accident was the prevailing factor in producing his injury.

The issues for the Board's review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?

2. Was the alleged accident the prevailing factor in claimant's injury, medical condition, and need for treatment?

FINDINGS OF FACT

Claimant was employed as a cashier at respondent's location in Lenexa, Kansas. Claimant was also certified to use a cart machine, an electronic machine that assists employees with moving shopping carts into the cart corral. Occasionally, he would work outside as a cart-pusher. Cart-pushers are not responsible for maintaining the premises.

On the evening of April 18, 2013, a manager asked claimant to work outside as a cart-pusher to fill the place of a sick employee. Claimant testified that while he was in the middle of the parking lot retrieving carts, he saw respondent's marketing manager, Randy Humbird, speaking with Susan Murphy and Michael Moots, two of respondent's customers. Ms. Murphy's vehicle had been damaged by a large rock, approximately 3 feet by 1 foot and weighing 400-600 pounds, that jutted from a median into a parking space.

After Mr. Humbird took photographs of the rock and the truck's damage, both he and Mr. Moots began to manipulate the rock. In a written statement dated April 22, 2013, Ms. Murphy indicated that Mr. Moots and Mr. Humbird unsuccessfully attempted to move the rock; however, Mr. Humbird testified that he and Mr. Moots were merely gauging its weight.

After Mr. Humbird and Mr. Moots tried to move the rock, claimant approached them and asked if they needed help. Claimant testified that they said they needed help. Mr. Humbird testified that they told claimant they did not need help. Claimant then reached down, grasped the front of the rock and moved it to the right. Claimant stated he felt "something" in his back when he released the rock.[3] He further noted that the sensation he felt was not "major," and he continued to work the rest of his shift.[4] Both claimant and Mr. Humbird testified claimant did not cry out in pain nor indicate he was injured at the time of the incident. Claimant stepped away, stretched his back, and continued with his work.

Mr. Humbird denied asking claimant to assist in moving the rock. He maintains he told claimant not to move the rock and that they would utilize a forklift. He did not attempt to physically restrain claimant. Mr. Humbird claims both Ms. Murphy and Mr. Moots also stressed to claimant to leave the rock alone so as to avoid injury. Ms. Murphy and Mr. Moots confirmed this testimony in their written statement. Respondent eventually moved the rock with a forklift.

After completing his shift, claimant testified he went directly home without attempting to lift or move anything. The next morning claimant woke with severe pain in his back. He testified he required assistance to leave his bed, and at that point he called respondent to report his injury. A member of respondent's management directed claimant to report to the office to complete an accident report.

Nick Yount, a hardline manager for respondent, submitted a written report on April 24, 2013, concerning his meeting with claimant regarding the incident. Mr. Yount testified he met with claimant while claimant completed the accident report. To the best of his recollection, Mr. Yount described the conversation:

> I asked [claimant], while filling out accident paperwork, if [Mr. Humbird] or the member asked him to move the rock. He told me they didn't tell him not to move the rock. I asked him if he was sure, he said yes and just shrugged his shoulders.[5]

Mr. Yount was not present during the incident of April 18, 2013.

Claimant was referred by respondent to KU MedWest Occupational Health on April 19, 2013. Claimant presented with lower and middle back pain after helping move a large rock. He was diagnosed with lumbar and thoracic strain, prescribed pain medication, and directed to apply ice to the injury three times per day. X-rays taken of claimant's thoracic and lumbar spine confirmed there was no fracture. Physical therapy was ordered.

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[3] P.H. Trans. at 11.

[4] *Id*.

[5] P.H. Trans., Resp. Ex. D at 1.

Claimant was released back to work with restrictions, including no heavy or repetitive lifting and no heavy or repetitive pushing and/or pulling. Respondent accommodated claimant's restrictions.

Claimant followed up with KU MedWest before visiting the emergency room at the University of Kansas Hospital on April 29, 2013. Claimant presented with back pain and urinary incontinence. Pain medication and muscle relaxants were prescribed. Claimant was taken off work until May 2, 2013, and directed to follow up for an MRI.

On April 30, 2013, claimant was again seen at KU MedWest for continued worsening back pain and incontinence. Claimant was to continue with his treatment plan, including physical therapy. An MRI of the thoracic spine and an MRI of the lumbar spine were ordered.

Claimant had no additional medical treatment following his April 30, 2013, visit to KU MedWest. Respondent denied additional medical treatment due to compensability issues. Claimant is unable to remember the last day he worked, though he admits to discontinuing work at respondent after experiencing an episode of incontinence during his shift.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501(a)(1) states:

> Compensation for an injury shall be disallowed if such injury to the employee results from:
> (A) The employee's deliberate intention to cause such injury;
> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

K.S.A. 2012 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f) states:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.
(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.
(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the

> employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2012 Supp. 44-508(g) states:

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?

Respondent argues that this claim is not compensable because claimant was performing forbidden or prohibited work. This exception to coverage is not contained in the Kansas Workers Compensation Act. In support of this argument, Respondent cites *Hoover v. Ehrsam Company.*[8] The Kansas Supreme Court in *Hoover* stated, "If the employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment."[9]

In *Hoover*, the employee performed manual labor for many years for the company and sustained various physical injuries. Therefore, the company changed his job to a supervisor and forbade him from doing any manual labor. The employee was injured while using a jack bar to help another employee un-jam a sheet metal press.

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[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2012 Supp. 44-555c(k).

[8] *Hoover v. Ehrsam Company*, 218 Kan. 662, 544 P.2d 1366 (1976).

[9] *Id*. at 667.

The *Hoover* court also recognized the rule that "an act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment."[10] However, the claimant, in *Hoover*, was denied benefits because he was specifically forbidden by his employer from performing any kind of manual labor.

Mr. Humbird testified on behalf of the respondent that he told claimant not to attempt to move the rock. Mr. Humbird also testified that he and the customer did not attempt to move the rock, which is not consistent with the video.[11] The video shows Mr. Humbird trying to move the rock by himself and with Mr. Moots. Mr. Humbird testified that he was simply trying gauge the weight of the rock. This statement is inconsistent with the video and the written statement of Susan Murphy that her husband and Mr. Humbird tried to move the rock.

This Board Member finds claimant's testimony to be credible and consistent with the video evidence. The evidence supports a finding that claimant suffered an injury arising out of and in the course of his employment.

2. Was the alleged accident the prevailing factor in claimant's injury, medical condition, and need for treatment?

K.S.A. 2012 Supp. 44-508(f) does not require a specific medical opinion to make a finding that claimant's accident was the prevailing factor causing his injury and current need for medical treatment. K.S.A. 2012 Supp. 44-508(g) states in part, "In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties." Here, ALJ Belden did just that. Claimant testified he injured his back while moving a large rock, or small boulder. The oral and video evidence is undisputed that claimant moved a very large rock. As a result of the injury, claimant sought medical treatment. This Board Member finds that claimant met his burden of proof on the issue of prevailing factor.

CONCLUSION

Claimant sustained personal injury by accident arising out of and in the course of his employment with respondent while performing an activity undertaken in good faith to advance the employer's interests. Claimant's injury by accident on April 18, 2013, was the prevailing factor in claimant's injury, medical condition, and need for treatment.

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[10] *Id*. at 666, citing 1 *Larson, Workmen's Compensation Law* § 27.00, p. 5-212.

[11] P.H. Trans., Cl. Ex. 1.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge William G. Belden dated June 14, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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William G. Belden, Administrative Law Judge